(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
New England Plating Co.	)	NPDES Appeal No. 00-7
Permit No. MA0005088	)	

[Decided March 29, 2001]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

NEW ENGLAND PLATING CO.

NPDES Appeal No. 00-7

ORDER DENYING REVIEW

Decided March 29, 2001

Syllabus

Petitioner, New England Plating Co. ("NEP"), filed a Petition for Review ("Petition") seeking revision of one of the conditions in a final National Pollutant Discharge Elimination System ("NPDES") permit decision issued by U.S. Environmental Protection Agency ("EPA"), Region I ("Region"), for the discharge of treated waters into a storm drain that converges with the Blackstone River in Worcester, Massachusetts. NEP challenges the adequacy of the effective date of the final permit with respect to the whole effluent toxicity ("WET") test limit. Petitioner posits that a compliance schedule should have been provided to allow Petitioner additional time to meet the limitation.

Petitioner raises four arguments in support of its request: (1) a deferral in compliance will not materially adversely affect the interests of both the facility and the public; (2) any adverse effect is outweighed by the benefits likely to result from a delay; (3) the deferral will not cause severe impact on the receiving water body because the Blackstone River passes the WET test; and (4) the economic cost of immediate compliance should be considered because NEP is a small business.

Held: The Board denies review of the Petition. The Board denies review because the issue of the compliance date was reasonably ascertainable but was not raised during the public comment period as 40 C.F.R. sections 124.13 and 124.19(a) require. Further, since Region I did not have a fair opportunity to respond to this issue in its Response to Comments and since this issue is distinct from other issues raised in comments, the Board declines to apply the "very closely related issue" rationale as a basis for reviewing this issue on the merits. Finally, even if the issue had been properly preserved for review, the Board would decline to grant review because Petitioner has failed to show that the Region abused its discretion or committed a clear error of fact or law in not providing a compliance schedule or delayed effective date.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

In a petition dated August 1, 2000, New England Plating Co. ("NEP" or "Petitioner") seeks review of one aspect of a final National Pollutant Discharge Elimination System ("NPDES") permit decision[1] ("permit") issued by U.S. Environmental Protection Agency ("EPA") Region I ("Region I") on February 25, 2000. Petitioner challenges the adequacy of the effective date of the final permit with respect to the whole effluent toxicity[2] ("WET") limit and requests a compliance schedule for meeting the limit. NEP contends that "[t]he 60-day period [between the time of permit issuance and the effective date of the permit] was inadequate to complete all that is required to meet the WET test limitation." Petition of Appeal ("Petition") at 1.[3] Petitioner requests "to have until the end of July 2001, before the effective date for compliance of the [WET] permit limitation." *Id.* at 2.

In support of its request, NEP argues that there are several considerations the Board should take into account. These are: (1) the interests of both the facility and the public are not likely to be materially adversely affected by the deferral; (2) any adverse effect is outweighed by the benefits likely to result from a delay in compliance; (3) no severe adverse impact on the surface waters would be caused by the deferral

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[1]Under the Clean Water Act ("CWA"), discharges into waters of the United States by point sources, such as NEP's discharges, must have a permit in order to be lawful. *See* CWA § 301, 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. *See* CWA § 402, 33 U.S.C. § 1342.

[2]Whole effluent toxicity ("WET") is defined under EPA regulations as "the aggregate toxic effect of an effluent measured directly by a toxicity test." 40 C.F.R. § 122.2 (2000) WET is one element in EPA's integrated approach to controlling toxic discharges into waters of the United States. *See* U.S. EPA Office of Water, NPDES Permit Writers' Manual § 6.2.2, at 94 (1996). Basically, the WET approach protects the quality of the receiving water body from the aggregate toxic effects of a mixture of pollutants in the effluent. *Id*. The WET approach is implemented by measuring the degree of response of aquatic test organisms that have been exposed to toxic pollutants over short and long periods of time. These two types of WET tests are known respectively as acute and chronic toxicity testing. *See id*. at 95.

[3]In the Petition NEP explained that it has consistently met all of the conditions except the limitations for the WET testing. Petition at 1.

because the receiving water body passes the WET test;[4] and (4) NEP is a small business and the economic impact of immediate compliance should be considered. *Id.*

In its response, Region I requests the dismissal of Petitioner's claims because "[d]uring the public comment period, [NEP] failed to comment on the issue of the compliance date for the WET limits identified in this permit." Response to the Petition for Review ("Response") at 6. Region I further alleges that "the Region did not commit clear error or otherwise abuse its discretion in issuing this permit without an extended compliance schedule." *Id.* at 1.

I. *BACKGROUND*

NEP is an electroplating and metal finishing company located in Worcester, Massachusetts. In 1997, NEP applied for renewal of its existing NPDES permit ("the 1993 permit").[5] The 1993 permit

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[4]NEP discharges treated wastewater directly into the Mill Brook storm drain, which flows into the Blackstone River located downstream from NEP's discharge point. The receiving water body to which NEP refers in its argument is the Blackstone River where different water sources converge and dilution takes place. The Region, on the other hand, focuses on the effects of noncompliance on the immediate area of the outfall, where complete mixing may not occur. According to the Region, it was because of concerns about incomplete mixing in the immediate area of the outfall that the permit maintained the WET limit. *See* Response Exhibit 1, at 5 (Fact Sheet); *see* discussion *infra* Part II.C.

[5]On November 2, 1993, NEP appealed to the Board the denial of a request for an evidentiary hearing on the 1993 permit. *See* Response Exhibit 5, at 3-4 (Order for Compliance). In its 1993 request for evidentiary hearing, NEP challenged several limits in the 1993 permit, including the WET limitation. NEP subsequently withdrew its appeal to the Board and in 1994 entered into a settlement with the Region in the form of an Order for Compliance. *See* Response at 3 n.1; Response Exhibit 5, at 4. The Order for Compliance provided a schedule for compliance for some of the challenged limits, established monitoring and reporting requirements, and required NEP to complete certain process changes within a specified time frame. The order did not provide a specific compliance date for the WET limitation. Rather, the Region ordered NEP to conduct a Toxicity Reduction Evaluation ("TRE") and submit reports within established time (continued...)

authorized the discharges of treated wastewater into the Mill Brook storm drain, which flows into the Blackstone River.

In its 1997 request for renewal, NEP noted that it was experiencing problems in meeting the WET test limitation[6] and requested that during the permit process a meeting be held with Region I and the Massachusetts Department of Environmental Protection ("MADEP") to discuss setting a limit that could be met. *See* Response Exhibit 7. In addition, on October 27, 1999, NEP submitted a letter to Region I requesting that the WET test limitation in the 1993 permit be changed because the facility was unable to satisfy the specified WET test limit of LC_{50}=100% for one of the test species.[7] *See* Response Exhibit 8, at 1.

On January 13, 2000, EPA issued a draft permit and sought public comment on the draft permit. The draft permit incorporated the same LC_{50}=100% effluent limitation contained in the 1993 permit. During the public comment period NEP orally requested that Region I treat its October 27, 1999 letter as comments on the draft permit.[8] No

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[5](...continued)
frames. The purpose of the TRE was to identify actions necessary to help NEP achieve compliance. *See* Response Exhibit 5, at 5. According to Region I, compliance with the effluent limits (other than the WET limitation) and close-out of the Order for Compliance was achieved by March 28, 1997. Response at 3 n.1; *see also* Response Exhibits 6-7.

[6]The 1993 permit contained acute WET testing requirements. The 1993 permit established an LC_{50} limitation of 100 percent ("LC_{50}=100%"). Acute toxicity results are often expressed as LC_{50}, which is a measure of the concentration of effluent that is lethal to 50 percent of the exposed test organisms. *See* U.S. EPA Office of Water, NPDES Permit Writers' Manual § 6.2.2, at 94-96 (1996).

[7]The 1993 permit specified two test species for the acute test: (1) the daphnid, *Ceriodaphnia dubia*; and (2) the fathead minnow, *Pimephales promelas*. According to NEP, it only had problems meeting the LC_{50}=100% acute test for the *Ceriodaphnia dubia.*

[8]According to Region I, NEP did not submit any written comments during the comment period. However, during the comment period the Region's permit writer spoke (continued...)

other comments concerning NEP's inability to meet the WET test limitation were received during the public comment period.

Region I thereafter proceeded with the preparation of the final permit and, on February 25, 2000, issued the final NPDES permit decision. By its terms, the permit was to be effective sixty days after issuance. On March 17, 2000, Petitioner filed a timely request for an evidentiary hearing with the Regional Administrator seeking additional time to comply with the WET test limitation. In its request for an evidentiary hearing, NEP indicated that the "60-day period is inadequate to complete all that is required" to meet the WET test limitation, and requested an extension of time to 180 days. *See* Response Exhibit 10, at 1 (Hearing Request). NEP further stated that if no success was achieved during the 180-day period in meeting the limitation, it would proceed with another request for extension. *Id.* at 2.

In accordance with the procedure provided by amendments to the NPDES regulations, NEP filed a timely appeal with this Board.[9] For the reasons stated below, NEP's petition is denied.

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[8](...continued)
with NEP's consultant, who asked EPA to treat NEP's previously submitted letter as NEP's comments on the draft permit. *See* Response at 6 n.3.

[9]On May 15, 2000, the U.S. Environmental Protection Agency published "Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two." *See* 65 Fed. Reg. 30,886 (May 15, 2000). The rules, effective July 14, 2000, revised the procedures for decisionmaking with respect to NPDES permits. 40 C.F.R. pt. 124. Section 124.21(c)(3), as amended by 65 Fed. Reg. 30,886, 30,911, provides that "[f]or any NPDES permit decision for which a request for evidentiary hearing was filed on or prior to June 13, 2000 but was neither granted nor denied prior to that date, the Regional Administrator shall no later than July 14, 2000, notify the requester that the request for evidentiary hearing is being returned without prejudice. * * * The requester may file an appeal with the Board, * * * no later than August 13, 2000." 40 C.F.R. § 124.21(c)(3) (2000). On July 14, 2000, Region I returned NEP's request for an evidentiary hearing as required by the amendments. NEP's appeal was timely received by this Board on August 8, 2000.

II. *DISCUSSION*

Ordinarily, in appeals under 40 C.F.R. § 124.19(a), the Board will not grant review unless it appears from the petition that the permit condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board, in its discretion, should review.[10] 40 C.F.R. § 124.19(a) (2000). While the Board has broad power to review decisions under section 124.19, the Agency intended this power to be exercised "only sparingly." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *In re Rohm & Haas Co.*, RCRA Appeal No. 98-2, slip op. at 7 (EAB, Oct. 5, 2000), 9 E.A.D. __; *In re AES P.R. L.P.*, PSD Appeal Nos. 98-29 to 98-31, slip op. at 7 (EAB, May 27, 1999), 8 E.A.D. __, *aff'd sub*

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[10]Prior to the amendments to streamline the NPDES regulations, the rules governing petitions for review of NPDES permitting decisions were set out in 40 C.F.R. § 124.91. These rules did not provide for an appeal directly to the Board. Instead, a person seeking review of an NPDES permitting decision was required to first request an evidentiary hearing before the Regional Administrator. The outcome of the request for an evidentiary hearing or the outcome of an evidentiary hearing (if the request was granted) was then appealable to the Board. However, under those rules there was no review as a matter of right from the Regional Administrator's decision or the denial of an evidentiary hearing. *See In re City of Port St. Joe*, 7 E.A.D. 275, 282 (EAB 1997); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995); *In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31, 41 (EAB 1994). Petitions for review of NPDES permits are now regulated by 40 C.F.R. § 124.19, as amended by 65 Fed. Reg. 30,886, 30,911 (May 15, 2000). Even though the regulations governing NPDES appeals changed in the sense that the evidentiary hearing provisions were eliminated, the standard of review has not changed. *See In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 9 n.11 (EAB, Feb. 26, 2001), 9 E.A.D. __. The standard of review under 40 C.F.R. § 124.91 was similar to that under 40 C.F.R. § 124.19. For instance, under section 124.91 a petition for review was not granted unless the Regional Administrator's denial or Administrative Law Judge's decision was clearly erroneous or involved an exercise of discretion or important policy that merited review by the Board. This same principle applies under section 124.19. *See* 40 C.F.R. § 124.19(a)(1)-(2)(2000). Likewise, other principles such as exercising the power of review only sparingly, the burden of demonstrating that the petition warrants review, and that most permits should be adjudicated at the Regional level, are still applicable to petitions for review of NPDES permitting decisions under section 124.19. *Compare* 44 Fed. Reg. 32,854, 32,887 (June 7, 1979) (preamble to § 124.101, former § 124.91) *with* 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (preamble to § 124.19).

nom. Sur Contra La Contaminación v. EPA, 202 F.3d 443 (1st Cir. 2000). Agency policy favors final adjudication of most permits at the Regional level. 45 Fed. Reg. at 33,412.

On appeal to the Board, the petitioner bears the burden of demonstrating that review is warranted. *AES P.R.*, slip op. at 7, 8 E.A.D. __; *In re Haw. Elec. Light Co.*, PDS Appeal Nos. 97-15 to 97-23, slip op. at 8 (EAB, Nov. 25, 1998), 8 E.A.D. __; *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997). Although the Board broadly construes petitions that are filed without the apparent aid of legal counsel, like the petition filed by NEP, the burden of demonstrating that review is warranted nonetheless inevitably rests with the petitioner challenging the permit decision. *In re Encogen Cogeneration Facility*, PSD Appeal Nos. 98-22 to 98-24, slip op. at 8 (EAB, Mar. 26, 1999), 8 E.A.D. __; *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996).

Persons seeking review must also demonstrate to the Board "that any issues being raised were raised during the public comment period to the extent required by these regulations * * *." 40 C.F.R. § 124.19(a). The Board has consistently declined to review issues or arguments in petitions that fail to satisfy this basic requirement. *In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Water Treatment Plants*, NPDES Appeal No. 99-2, slip op. at 15 (EAB, Nov. 1, 2000), 9 E.A.D. __, *appeal docketed*, No. 01-70263 (9th Cir. Feb. 17, 2001); *see, e.g., In re Rockgen Energy Center*, PSD Appeal No. 99-1, slip op. at 7-8 (EAB, Aug. 25, 1999), 8 E.A.D. __.[11]

Participation during the comment period must conform with the requirements of section 124.13. *See, e.g., City of Phoenix*, slip op. at 15, 9 E.A.D. __ ("In construing the requirements of section 124.19, the Board has done so in conjunction with section 124.13."). Under 40

[11]Standing to appeal a final permit determination is limited under section 124.19 to those persons "who filed comments on [the] draft permit or participated in the public hearing." Any person who failed to comment or participate in the public hearing on the draft permit can appeal "only to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a); *see City of Phoenix*, slip op. at 14, 9 E.A.D. __.

C.F.R. § 124.13, "[a]ll persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise *all reasonably ascertainable issues* and submit *all reasonably available arguments* supporting their position by the close of the public comment period * * *." 40 C.F.R. § 124.13 (2000) (emphasis added); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 53 (EAB 1995). Accordingly, only those issues and arguments raised during the comment period can form the basis for an appeal before the Board (except to the extent that issues or arguments were not reasonably ascertainable). *See, e.g., In re Jett Black, Inc.*, UIC Appeal Nos. 98-3 & 98-5, slip. op. at 8 & nn.18, 23 (EAB, May 27, 1999), 8 E.A.D. __ (finding that reasonably ascertainable arguments not raised during the public comment period were not preserved for appeal).

In the instant case, as noted previously, NEP submitted comments on the draft permit.[12] The only concern raised in the comments was that NEP was not able to meet the WET test limit of LC_{50}=100% for the daphnid species *Ceriodaphnia dubia* and for that reason NEP requested the limitation be changed to a lower limit.[13] In its Petition, however, NEP did not challenge the WET limitation itself.

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[12] *See supra* note 8.

[13] NEP's comments were the following:

> [W]e request that the limitation in the existing 1993 Permit that covers the parameter Acute Whole Effluent Toxicity be changed. The limit LC_{50}=100% cannot be met for the invertebrate species Ceriodaphnia dubia. * * * It is believed that the receiving stream can tolerate a much lower factor without harming the aquatic life. * * * The MADEP can use a site-specific approach to lower the LC_{50} limit. * * * This letter is being sent to solicit the assistance of your organizations in resolving the problem before the permit is renewed. We will gladly answer any questions that you might have that will aid you in reducing the limit LC_{50}=100% for this specific site.

Response Exhibit 8, at 1, 3.

Rather, it accepted the limitation, but requested that the permit's effective date for this condition be changed to allow Petitioner to have additional time -- an additional year and a quarter after the effective date of the permit -- to come into compliance. *See* Petition at 2.

Accordingly, before reaching the merits of this issue, we must first decide whether the issue raised in the Petition was raised during the comment period and, if not, whether this issue was reasonably ascertainable during the comment period.[14]

A. *Was the Issue Raised During the Comment Period?*

In evaluating whether to review an issue on appeal, this Board frequently has emphasized that the issue to be reviewed must have been *specifically raised* during the comment period. *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 95 (EAB, June 22, 2000), 8 E.A.D. __; *In re Maui Elec. Co.*, PSD Appeal No. 98-2, slip op. at 11 (EAB, Sept. 10, 1998), 8 E.A.D. __. On this basis, we have often denied review of issues raised on appeal that were not raised with the requisite specificity during the public comment period. *See, e.g.*, *Fla. Pulp*, 6 E.A.D. at 54-55 (denying review on the basis that a comment regarding one aspect of testing sludge required by an NPDES permit was not sufficient to preserve for appeal the question of legal authority to require any sludge testing); *In re Pollution Control Indus. of Ind., Inc.*, 4 E.A.D. 162, 166-69 (EAB 1992) (denying review because comments on two aspects of testing requirement in permit were not sufficient to raise, on appeal, general objection to any testing requirement); *Maui*, slip. op. at 10-15, 8 E.A.D. __ (comments raising general issue of whether particular fuel was obtainable from fuel suppliers were not sufficient to preserve objection on appeal that, in a prior decision, the permit issuer determined this fuel was "available" for purposes of determining the best available control technology ("BACT") under the Clean Air Act new source review program).

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[14] An issue not raised during the comment period may nonetheless be raised on appeal if it was not reasonably ascertainable during the comment period. *See* 40 C.F.R. § 124.13.

Adherence to the requirements in 40 C.F.R. § 124.13 is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting the Agency's longstanding policy that most permit issues should be resolved at the Regional level, and to provide predictability and finality to the permitting process. *Fla. Pulp*, 6 E.A.D. at 53; *In re Sutter Power Plant*, PSD Appeal Nos. 99-6 & 99-73, slip op. at 9 (EAB, Dec. 2, 1999), 8 E.A.D. __ ("The intent of these rules is to ensure that the permitting authority * * * has the first opportunity to address any objections to the permit, and the permit process will have some finality."). As we stated in *Encogen*, "[t]he effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final." *In re Encogen Cogeneration Facility*, PSD Appeal Nos. 98-22 to 98-24, slip op. at 8 (EAB, Mar. 26, 1999), 8 E.A.D. __.

In limited circumstances, this Board has considered the merits of an issue not specifically raised in comments below where the specific issue raised in the petition is very closely related to challenges raised during the comment period, and the Region had the opportunity to address the concerns in its response to comments. *See In re Ecoeléctrica, L.P.*, 7 E.A.D. 56, 64 n.9 (EAB 1997) ("[B]ecause the issue of data currentness is so closely related to the challenges to the existing air quality data that were properly preserved for review * * * and that the Region has had an opportunity to address, we decline to deny review based on the Committee's alleged failure to preserve a specific data-currentness objection."); *In re P.R. Elec. Power Auth.*, 6 E.A.D. 253, 257 n.5 (EAB 1995) ("Because the issue of meteorological data was generally raised during the comment period, *and the Region's response to comments adequately addresses the concerns raised in the petition*, we decline to deny review on the basis that this issue was not preserved for review.") (emphasis added). This doctrine, however, has been rarely applied, and generally in circumstances where the Region had an opportunity to address the concerns in its response to comments. The doctrine helps guard against a hypertechnical approach to issue preservation while simultaneously furthering the important principle that

the Region, as a practical matter, first have an opportunity to consider the issue.

With this as background, we now consider whether the issue NEP raises on appeal has been preserved for Board review. In its comments during the public comment period, NEP did not specifically request a compliance schedule or a delayed effective date for the WET limitation. Even broadly construing NEP's comments, we do not believe the issue now raised on appeal is within the scope of those comments. NEP based its request for a change in the limit itself on allegations that "the receiving stream [the Blackstone River] can tolerate a much lower dilution factor without harming the aquatic life".[15] Response Exhibit 8. NEP's comments were aimed at convincing Region I and MADEP to use a "site-specific approach to lower the LC_{50} limit" to allow for greater dilution. *Id.* Nothing in its comments, however, reasonably reveal NEP's intention to request a delayed effective date if the Region was unconvinced that greater dilution was possible and declined to change the limitation. Moreover, the Region's authority to grant a compliance schedule is limited under any circumstances; such a schedule can be granted only upon a determination that such a schedule is appropriate.[16] We therefore do not see how NEP's comments can be fairly read to

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[15] *See supra* note 13.

[16] "[A]s a general rule, NPDES permits * * * must require compliance with water quality-based effluent limitations immediately upon the effective date of the permit." *In re J&L Specialty Prods. Corp.*, 5 E.A.D. 333, 344 (EAB 1994). However, an exception to this general rule allows a compliance schedule if the state's water quality standards or its implementing regulations "can be fairly construed as authorizing a schedule of compliance." *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175 (Adm'r 1990), *modification denied*, 4 E.A.D. 33, 34 (EAB 1992). Under the Massachusetts water quality standards, which are applicable here, compliance schedules may be granted when appropriate. *See* Mass. Regs. Code tit. 314, § 4.03(1)(1996) ("A permit may, when appropriate, specify a schedule leading to compliance with the Massachusetts and Federal Acts and regulations."). Thus, although Region I may provide a compliance schedule, it can only do so upon a determination that such a schedule is "appropriate."

encompass a request for such specific relief.[17] Finally, simply because NEP raised the issue of its alleged inability to meet the WET test limit does not mean the Region should reasonably have inferred that a compliance schedule was being requested and should have addressed this issue *sua sponte* in its response to comments.[18]

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[17]Even if the issue of a compliance schedule or delayed effective date was encompassed within NEP's comments on the draft permit, which we think it was not, NEP did not support any such assertion with all reasonably available arguments as required by 40 C.F.R. § 124.13. For this reason as well, we decline to review the petition. As noted previously, section 124.13 requires that all reasonably available arguments in support of challenges to the draft permit be submitted by the close of the public comment period. NEP not only failed to specifically raise the issue during the comment period, but it also did not provide arguments to support the appropriateness of a compliance schedule. In support of its request for a lower LC_{50} limit, Petitioner submitted comments stating that the receiving stream, the Blackstone River, can tolerate a much lower dilution factor. *See supra* note 13. It also explained that salinity in NEP's discharges was the primary cause for failure to meet the WET limitation. Response Exhibit 8, at 2; *see infra* note 25. These comments, which were the only arguments made by Petitioner to justify its request, do not provide a basis on which the Region could assess the "appropriateness" of a compliance schedule in this given case or even the length of any such schedule. Notably absent from the comments, for example, are any reasons why the extension was needed and the length of any such extension.

[18]It is true that, based on the compliance history at this facility, Region I might have anticipated the company's interest in a compliance schedule. However, a petitioner may not rely solely on the history of a facility or a permit to preserve issues for review. Rather, consistent with the regulations, the issue raised on appeal must be properly raised during the comment period. In *City of Phoenix,* an NPDES case, we denied review because the issues raised on appeal were raised prior to and not during the public comment period. Our decision was premised on the notion that the public comment period is a contained process, and that the permitting authority is not obligated to consider and address the full panoply of issues that may have been raised at one point in a multi-year permitting process and that may or may not still be in dispute at the time of the public comment period. Rather, it is incumbent upon the commenter to raise during the comment period all issues that are still in dispute at that time. *See In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Water Treatment Plants*, NPDES Appeal No. 99-2, slip op. at 15 (EAB, Nov. 1, 2000), 9 E.A.D. __, *appeal docketed*, No. 01-70263 (9th Cir. Feb. 17, 2001). To expect Region I to have addressed, *sua sponte*, the issue of a delayed effective date in its response to comments only because it was aware of Petitioner's past failure to meet the limitation places an inappropriate burden on the Region and would undermine the orderly process established by the permitting

(continued...)

Furthermore, we do not believe this is the type of case that merits the application of the "very closely related issue" rationale outlined above, by which the Board has occasionally reviewed on the merits an issue that is very closely related to an issue raised during the comment period. In the few instances where this rationale has been applied, the issue was so closely related that the Region effectively addressed during the comment period the concerns raised on appeal. This is not the situation here. In its Response to Public Comments ("Response to Comments"), the Region specifically addressed NEP's request to change the WET limitation by stating that "[t]his toxicity testing and limit is required as a State certification[19] requirement and is usually required for process wastewater discharges by the EPA.[20] We suggest that the permittee continue to implement process changes which will further reduce salinity and metals in the effluent, which should work towards improved WET test results." Response to Comments, Comment #1. The Region's Response to Comments explains why the WET limitation is necessary and properly responded to NEP's argument about its alleged inability to meet the limitation. Nothing in the Response to

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[18](...continued)
regulations.

[19]Section 401(a)(1) of the CWA requires all NPDES permit applicants to obtain a certification from the state in which the discharge originates or will originate that the permit contains the conditions necessary to assure compliance with the federal and state water pollution control standards. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). Accordingly, EPA may not issue a permit until a certification is granted or waived by the state, and a final permit may not be issued unless it incorporates the conditions and limitations specified in the state certification. *See* 40 C.F.R. §§ 124.53(a), .55(a)(2).

[20]The CWA requires NPDES permits to contain limitations necessary to meet water quality standards set by states and approved by EPA. *See* CWA §§ 301(b)(1)(c), 402(a)(2), 33 U.S.C. §§ 1311(b)(1)(c), 1342(a)(2). Massachusetts has an EPA-approved water quality standard that requires "all surface waters [to] be free from pollutants in concentrations or combinations that are toxic to humans, aquatic life or wildlife." Mass. Regs. Code tit. 314, § 4.05(5)(e) (1996). Additionally, when EPA finds that "a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity." 40 C.F.R. § 122.44(d)(1)(v).

Comments indicates the Region viewed the question of a compliance schedule or delayed effective date as so closely related to or intertwined with the issue raised in the comments that it addressed in its Response to Comments the issue pertinent to whether a compliance schedule was appropriate. Since Region I did not have a fair opportunity to respond to this issue in its Response to Comments, and since the issue is distinct from the one raised in comments, we decline to apply the "closely related issue" rationale as a basis for reviewing this issue on the merits.

Because it is Petitioner's responsibility to specifically raise the issues it wishes to preserve for review during the comment period, and the Region is under no obligation to speculate about possible concerns that were not articulated in the comments, we find that NEP's comments concerning its inability to meet the LC_{50}=100% WET limit were not sufficient to encompass the specific request for a compliance schedule or delayed effective date this Board is now asked to consider.[21]

B. *Was the Issue Reasonably Ascertainable*?

We now proceed to the second step of our analysis, to examine whether the issue before us was reasonably ascertainable by NEP during the comment period. The record before us shows that NEP had experienced problems in meeting the WET limitation since issuance of the 1993 permit.[22] The Order for Compliance directed NEP to conduct a Toxicity Reduction Evaluation ("TRE") for the purpose of identifying

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[21]As previously discussed, although this Board generally tries to broadly construe petitions filed without the apparent aid of legal counsel, the petitioner nonetheless is required to demonstrate that review is warranted. We do not think it is unreasonable to expect a *pro se* petitioner to state during the comment period that it may need more time to comply with the WET limit and to explain the basis for any such request. NEP's comments on the draft permit were submitted by an environmental consultant hired by Petitioner. It is eminently reasonable to expect NEP, through its consultant, to put the Region on notice of what additional time might have been needed by its client to comply with a limitation that, apparently, for years had been a problem.

[22]*See* Response Exhibits 5-8.

actions needed to be taken to achieve compliance.[23] NEP completed the TRE in 1995;[24] thus, it is reasonable to assume that NEP studied and identified ways to help the company to come into compliance long before the comment period at issue here.[25] In our view, the issue was reasonably ascertainable and NEP should have considered the possibility that it may need a compliance schedule if the limit was not changed. Accordingly, since 40 C.F.R. § 124.13 requires *all* reasonably ascertainable issues to be raised by the close of the public comment period, NEP should have raised the need for a compliance schedule in its comments on the draft permit, as an alternative to its only request that the limit be changed, if it wished to preserve this issue for review.

Our conclusion that the issue was reasonably ascertainable is not affected by the fact that the draft permit proposed for comment did not contain an effective date. By regulation, a final permit decision becomes effective thirty days after the service of notice of the decision unless the decision specifies a later effective date. *See* 40 C.F.R. § 124.15(b) (2000). Although NEP did not know, when the draft permit was proposed, that Region I would set a more generous sixty-day period for the final permit to become effective, it is charged with knowledge of the regulations. Therefore, Petitioner should have raised in its comments its alleged inability to meet the WET limitation within the regulatory default period of thirty days and addressed, at that time, the possible need for a compliance schedule.

As previously discussed, petitioners are required to raise all reasonably ascertainable issues during the public comment period in

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[23] *See supra note* 5.

[24] Response Exhibit 1, at 5 (Fact Sheet).

[25] The record before us suggests that NEP became aware of the cause of noncompliance when the TRE was completed in 1995, approximately five years before the comment period. Response Exhibit 1, at 5 (Fact Sheet). In its comments on the draft permit NEP acknowledged that the primary cause for failure to meet the WET limit was the salinity of the discharge. Response Exhibit 8, at 2.

order to give the permit issuer the opportunity to make timely and appropriate adjustments to the permit determination or include an explanation of why the requested changes are not necessary. To allow this issue to be raised at this late date would undermine the important policy of providing for efficiency, predictability, and finality in the permit process.

C. *There Was No Clear Error or Abuse of Discretion*

Although we are denying review on threshold procedural grounds without reaching the merits, even if this Board were to consider the issue on the merits, we would not grant NEP's request. The petition, as well as the administrative record before us, simply do not provide a basis on which the Board may conclude the Region committed a clear error of fact or law in not providing a compliance schedule, or that the Region abused its discretion in not doing so.[26]

To begin with, NEP's arguments as to why the Board should grant review are general, largely unsubstantiated, and (as explained more fully *infra*), in part are inapposite to the considerations of the CWA. This Board has held that "mere allegations of error" are not enough to warrant review. *See In re Hadson Power 14 Buena Vista*, 4 E.A.D. 258, 294 n.54 (EAB 1992). Therefore, to warrant review allegations must be specific and substantiated. The petitioner must not only identify disputed issues but *demonstrate* the specific reasons why review is appropriate. *See id.*[27]

The first two arguments provided by NEP in support of this appeal are that the interests of both the facility and the public are not likely to be materially adversely affected by the deferral, and that any adverse effect on the receiving water (the Blackstone River) is

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[26] *See supra* notes 16-17.

[27] *See In re Terra Energy Ltd.*, 4 E.A.D. 159, 161 (EAB 1992) (denying review because petitioner's arguments were vague and unsubstantiated).

outweighed by the benefits likely to result from a delay in compliance. Neither of these arguments are supported with evidence.

NEP did not provide any documentation in support of its assertion about the public interest and how it is "not likely to be materially adversely affected." Likewise, Petitioner did not explain how the public will benefit from a deferral. It is not self-evident that the public will benefit from a delay in compliance. Even if there are any such benefits, NEP has not provided this Board with any supporting evidence to that effect.[28] In our view, Petitioner's general claims that a deferral will serve the public interest are insufficient to override the important objectives of the CWA.

NEP further argues that no severe adverse impact on the surface waters would be caused by the deferral because the receiving water body passes the WET test. This allegation is unpersuasive in light of the draft permit's fact sheet, which explains that Region I's principal concern is the immediate area of the outfall where NEP discharges. As previously noted, NEP discharges treated wastewater directly into the Mill Brook storm drain.[29] In the fact sheet Region I explained its concerns about incomplete mixing in the area where NEP discharges and the need for protecting the "organisms *immediately downstream* of the discharge where complete mixing may not occur." Response Exhibit 1, at 5 (Fact Sheet) (emphasis added). NEP's argument, on the other hand, focuses on the Blackstone River and not the immediate area of the outfall. Petitioner alleges that the Blackstone River can tolerate a much lower dilution factor, because it passes the WET test limitation for the *Ceriodaphnia dubia*. *See* Petition at 2. The Region, however, focused

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[28]One of the objectives of the CWA is to protect and maintain existing beneficial uses of navigable waters to prevent further degradation. *See PUD No. 1 of Jefferson County v. Wash. Dep't. of Ecology*, 511 U.S. 700, 704-05 (1994); *see also* 40 C.F.R. § 131.12. NEP alleges that a delay in compliance will serve the public interest; however, it does not explain how a delay will contribute to the protection and maintenance of the water quality of the receiving water body.

[29]*See supra* note 4.

on the protection of the immediate area of the outfall due to inadequate mixing and not on the Blackstone River per se. Because the WET test limitation was primarily maintained in the permit to protect the immediate area of the outfall and not the Blackstone River, we find this argument unpersuasive.

As a final argument, NEP asserts that it is a small business and that the economic impact of immediate compliance should be considered. In the first instance, there is little question that cost considerations play no role in the *setting* of effluent limits. The CWA and its implementing regulations clearly require the Region to set effluent limitations for any individual pollutant that has the reasonable potential to cause a water quality violation. *See* CWA §§ 301(b)(1)(c), 302, 402(a)(2), 33 U.S.C. §§ 1311(b)(1)(c), 1312, 1342(a)(2); 40 C.F.R. § 122.44(d); *In re Mass. Corr. Inst.-Bridgewater*, NPDES Appeal No. 00-9, slip op. at 10 n.7 (EAB, Oct. 16, 2000); *In re Town of Hopedale, Bd. of Water & Sewer Comm'rs*, NPDES Appeal No. 00-4, slip op. at 22 (EAB, Feb. 13, 2001). In the instant case the Region, pursuant to 40 C.F.R. § 122.44(d)(1)(v),[30] determined that the complexity of NEP's metal finishing effluent was such that a WET limitation was necessary to avoid violation of water quality standards for receiving waters. Response Exhibit 1, at 5 (Fact Sheet). As explained above the CWA generally requires both the establishment of, as well as immediate compliance with, water-quality based effluent limitations like the WET here. In requiring compliance with applicable water quality standards, the CWA simply does not make any exceptions for cost or technological feasibility. *Mass. Corr. Inst.-Bridgewater*, slip op. at 10; *In re City of Fayetteville*, 2 E.A.D. 594, 600-601 (CJO 1988). This being said, under the legal standards applicable here, compliance schedules are allowed as an exception to this general rule requiring immediate compliance upon the effective date of the

[30]Section 122.44(d)(1)(v) establishes that "when the permitting authority determines * * * that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity." 40 C.F.R. § 122.44(d)(1)(v).

permit, when deemed "appropriate" by the permit issuer.[31] In this limited sense costs may be considered, in the discretion of the permitting authority. There is nothing in the record before us that would cause us to find that the Region abused its discretion in not including a compliance schedule in the permit here. Indeed, based on the paucity of the information provided by Petitioner, we lack sufficient information to determine that a compliance schedule is appropriate, or even if appropriate, what that schedule might be. Therefore, we conclude the Region did not err in not providing one.[32]

We recognize that NEP has been considering options to come into compliance. The record shows evidence that the company has taken some steps to meet the LC_{50}=100% limit and appears willing to work with the MADEP and Region I in an effort to resolve this issue. *See* Response Exhibits 7, 8, 10. While we deny review of the issue raised on appeal, we do not intend to foreclose NEP from further discussing this matter with Region I and, as appropriate, from entering into a new administrative agreement with the Region.[33]

III. *CONCLUSION*

Because we conclude that the issue before us was reasonably ascertainable and was not raised in the comments submitted during the

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[31] *See supra* note 16.

[32] In explaining why economic considerations are relevant to this case, NEP indicates that the estimated cost to connect the discharge point to the sanitary sewer, instead of the Blackstone River where it has been discharging, is approximately $600,000. Petition at 2. However, NEP did not explain how a deferral will help to lower the cost of this particular method of compliance. In addition, we do not know whether this is the only feasible method for compliance or whether there are other less expensive methods that may be feasible.

[33] In its Response, the Region expressed openness on this front: "EPA has not ruled out the possibility of negotiating an additional order that contains concrete plans and adequate milestones to assure that the WET limit is met expeditiously. Such an order could consider the size and capabilities of the business." Response at 9 n.5.

public comment period, NEP's petition for review is hereby denied. Even if the issue on appeal had been properly preserved, we would deny review.

So ordered.